No. 82-2128

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

v.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit—on the basis of the specific facts of this case established in a five-month jury trial—correctly held that the anticompetitive and predatory practices adopted and implemented by petitioners to maintain their telephone terminal equipment monopoly were not protected by the First Amendment under the *Noerr-Pennington* doctrine.

STATEMENT REQUIRED BY RULE 28.1

Respondents Litton Systems, Inc. and Litton Business Systems, Inc. are each wholly-owned subsidiaries of Litton Industries, Inc. Respondent Litton Business Telephone Systems, Inc. is a wholly-owned subsidiary of respondent Litton Systems, Inc. Respondent Litton Industries Credit Corporation is a wholly-owned subsidiary of Litton Financial Services, Inc., which is a wholly-owned subsidiary of Litton Industries, Inc. In addition to other wholly-owned subsidiaries, Litton Industries, Inc. has a partially-owned affiliate, National Tag Co., an Ohio Corporation.

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APPENDIX *

* The Appendix to the Brief for the Respondents in Opposition ("Res. App.") has been separately bound, pursuant to Rules 21.1(k) and 22.2. The Appendix to the Petition for Writ of Certiorari will be cited as "Pet. App.," and the Joint Appendix filed in the Court of Appeals will be cited as "A". Finally, citations to the trial transcript will be designated as "Tr."

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MISCELLANEOUS

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STATEMENT OF THE CASE

Respondents ("Litton") file this brief in opposition to the petition of the Bell System companies ("AT&T") for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit. Like the Questions Presented, AT&T's Statement of the Case is surprisingly misleading and inaccurate. The statement actually ignores and is substantially contradicted by both the voluminous trial record and the jury's specific findings sup-

porting its verdict. The statement also misrepresents the decisions of the FCC and of the Court of Appeals.

The following is Litton's statement of the nature of the case, its regulatory context, and a summary of the trial proceedings and of the decision of the Court of Appeals.

A. NATURE OF THE CASE

1. Prior to 1956, AT&T had two absolute monopolies in the geographical areas of the country serviced by AT&T companies.[1] In those areas, AT&T had a lawful monopoly of the local central office switching systems and the wires and cables leading from them to its telephone customers' businesses and residences ("the telephone network"). However, it also possessed a second, but illegal, monopoly in the sale and lease of individual telephone sets and business telephone systems (key systems and PBXs). These telephone sets and systems are referred to in the industry as "telephone terminal equipment."[2]

After the expiration of the Bell patents at the end of the nineteenth century, AT&T maintained its telephone terminal equipment monopoly by exercising its monopoly power over the telephone network. AT&T did this simply by refusing to attach any competitor's terminal equipment to its network and by cutting off telephone service to any telephone customer who used non-Bell equipment. Pet. App. 8a. As the FCC later observed, it was as if an electric utility had refused to permit a toaster or other

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[1] AT&T "operating companies" provide the exclusive local telephone service in areas containing over 80% of the telephones in the United States. The rest of the country is serviced by 1600 independent local telephone companies (mostly small) which interconnect with AT&T's long distance service.

[2] Key systems, used primarily by small offices, allow a single telephone set to connect from 2 to 40 other sets through the use of buttons on the face of the telephone set. A 1786-87, 1784-85, 1787. PX 2207, 2208. PBX systems, used primarily by large business firms, employ a central console and a switching mechanism to allow interconnection of from about 40 to up to as many as several thousand telephones. A 1786-88.

electrical appliance to be plugged into a wall socket unless it was manufactured, installed and maintained by the utility. *In re Primary Instrument Concept*, 68 F.C.C.2d 1157, 1163-64 (1978) (Res. App. 97a, 103a-04a).

In two landmark decisions, the Court of Appeals in *Hush-A-Phone Corp. v. United States*, 238 F.2d 266 (D.C. Cir. 1956) and the FCC in *In re Carterfone Device*, 13 F.C.C.2d 420 (1968) (Res. App. 33a), articulated the rule of law that AT&T could not discriminate against equipment made or supplied by its competitors unless it could demonstrate that the competitors' equipment actually harmed the network. Both of these cases held AT&T's practices of excluding competitors' equipment to be illegal. Both cases also rejected as unsubstantiated AT&T's claims that the competitors' equipment was harmful.

2. In response to *Carterfone*, AT&T devised the interface device practice at issue in this case which it implemented by filing a new tariff in October 1968. Effective January 1, 1969, AT&T's tariff permitted customers to attach telephone terminal equipment supplied by its competitors to the telephone network, but only if the customer paid AT&T to provide, install and maintain an interface device as a barrier between the competitor's equipment and the network. The monthly rental for the interface device was prohibitive, amounting to several times the monthly rental AT&T charged for its telephone. No interface device was required, however, if the telephone customer obtained terminal equipment from AT&T, even where the equipment was identical to that of AT&T's competitors. A 1789-93, 1796, 1798-802, 1804-05, 2104-07, 2206, 2492-94, 2586-87, 5147, 8048.

Because of its expense and the opportunity it gave AT&T to interfere with every sale of terminal equipment by its competitors, the interface device made it economically impossible for other companies to compete successfully with AT&T in the business terminal equipment

market. Litton and every other nationwide competitor of AT&T (*i.e.*, ITT, General Electric, Arcata, and RCA) suffered losses and left that market by the end of 1976. PX 1932; PX 1933; A 1637, 16175, 1727, 3210-11, 3057-67, 12163-68; PX 5337 at 576, 579-81, 583-85; A 5764-77, 10683, 2407-08, 2422-24, 2426-31, 2432-36, 2665-66, 10897.

3. In June 1976, Litton filed its Complaint alleging that AT&T had violated Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976), by monopolizing and attempting to monopolize the telephone terminal equipment market through its imposition and maintenance of the interface device requirement and various other anticompetitive practices. AT&T's purported justification for its discriminatory practices at trial was what it had been in the past—that the interface device was necessary to protect the network from harm.

B. THE REGULATORY FRAMEWORK

Following passage of the Federal Communications Act in 1934, AT&T was required to describe its "practices" and rates in tariffs filed with the FCC. 47 U.S.C. § 203 (1976).[3] The FCC may suspend a practice or rate for five months (47 U.S.C. § 204(a) (1976)), and after hearing, may strike the practice or rate altogether if it is unreasonable, discriminatory or otherwise in violation of the Act. 47 U.S.C. § 205(a) (1976).

1. Prior to 1956, AT&T's practice of prohibiting interconnection of competitors' equipment to the network had been embodied in a tariff on file with the FCC. In *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 268-69 (D.C. Cir. 1956), the Court of Appeals struck down that tariff prohibition on the ground that AT&T was unable to substantiate its claim that the prohibition was neces-

[3] AT&T may engage only in those practices which it has disclosed to the FCC and the public through tariff filings. 47 U.S.C. §§ 203(b), 203(c) (1976). AT&T must then follow those practices until they are superseded by new tariffs.

sary to protect the network. The court held that under the Communications Act the barring of harmless equipment was an "unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental." *Id.* at 269.

On remand, the FCC in 1957 ruled that "a blanket prohibition" against customer-provided non-Bell equipment, "without discriminating between the harmful and the harmless," was illegal and that any similar restrictions would be illegal "to the extent that they prohibit a customer from using . . . the Hush-A-Phone device *or any other device* which does not injure defendants' employees, facilities, the public . . . or impair the operation of the telephone system." *Hush-A-Phone Corp. v. AT&T Co.*, 22 F.C.C. 112, 113-14 (1957) (Res. App. 27a, 28a-29a) (emphasis added).

Following the FCC's decision in 1957, AT&T allowed the Hush-A-Phone device to be attached to its network, but it ignored the broad mandate of the FCC order and its applicability to other equipment. AT&T's new tariff continued to proscribe, without distinguishing between harmful and harmless equipment, the direct electrical connection of any type of device with its telephone lines. A 6423. However, the FCC was not required to and therefore did not on its own initiative pass on the lawfulness of AT&T's post-*Hush-A-Phone* practice.

2. When the FCC in 1968 did review AT&T's post-*Hush-A-Phone* tariffs in a private antitrust action referred to it under the doctrine of primary jurisdiction, AT&T again sought to justify its exclusionary practice on the ground that its competitors' equipment would harm the network. *Carterfone* (Res. App. 33a). Finding that AT&T again had failed to substantiate its claim, the FCC held that the Bell System's practice was "unreasonable" and "unlawful" and that "[t]he vice of the present tariff, here as in *Hush-A-Phone*, is that it prohibits the use of harmless as well as harmful devices." *Id.* at 36a-

37a. Going beyond the mere decision that the Carterfone device was harmless, the FCC struck down AT&T's tariff in its entirety and further ruled that AT&T's exclusionary practice had been "unreasonable and unreasonably discriminatory since its inception." *Id.* at 38a. The FCC also rejected AT&T's efforts to make it appear that the Commission was in some way responsible for AT&T's tariff. The tariff, it stated, "was the carrier's own." *Id.*

In *Carterfone*, the FCC specifically suggested that AT&T could protect the network either by (1) adopting a practice of prohibiting equipment which "actually cause harm" (Res. App. 37a) or (2) specifying "technical standards" that distinguished between harmful and harmless equipment. *Id.* at 39a.[4] AT&T ignored these suggestions and adopted a new blanket practice applicable to all competitors' equipment, whether harmful or harmless. It imposed a costly, troublesome and unnecessary interface device as a barrier between any non-Bell-supplied equipment and AT&T's network, a device which had to be obtained from, installed by, and maintained by AT&T at a rental cost many times what AT&T charged for individual telephone sets. A 2113, 2495-96, 2586-87, 3829-30.

AT&T also urged the FCC not to suspend the interface device practice or to hold any "hearing or investigation" that would delay its effective date. *AT&T "Foreign Attachment" Revisions*, 15 F.C.C.2d 605 (1968) (Pet. App. 162a). At AT&T's request, the FCC permitted the tariff to go into effect without ruling on its validity but

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[4] In denying AT&T's request for reconsideration, the FCC emphasized AT&T's obligation to demonstrate "actual harmful effects" and the Commission's preference for "reasonable" technical "standards," and it underscored the broad sweep of its decision in *Carterfone*. *In re Carterfone Device*, 14 F.C.C.2d 571, 572 (1968) (reconsideration decision) (Res. App. 43a, 44a). It rejected the assertion that the issues "related solely to the Carterfone" device: "[I]t was well understood that this was an 'interconnection' case, and A.T.&T. and General both argued on a broad base . . . the need for a general prohibition against all interconnection not arranged by them." *Id.* at 573 (Res. App. 45a).

stated that in doing so "*we are not giving any specific approval to the revised tariffs.*" *Id.* at 167a (emphasis added).

3. When it became clear in the mid-1970s that AT&T was not going to replace the interface device practice with standards, the FCC was forced to pass on the validity of AT&T's interface tariff. In *First Report and Order in Docket 19528*, 56 F.C.C.2d 593, 598 (1975) (Res. App. 51a, 56a), the FCC declared the interface device tariff unlawful as an "unnecessarily restrictive limitation" and an "unjust and unreasonable discrimination." It reached this result because, in the intervening years after the *Carterfone* decision, AT&T had failed to present any evidence that the interface device was necessary to protect the network from harm. The FCC specifically found that numerous special entities such as utilities, the military and government agencies, as well as 1600 independent telephone companies, had connected non-Bell equipment directly to the Bell network with "no demonstration of network harm." *Id.* The FCC further pointed out that AT&T's interface device practice had been unlawful from the beginning because *Carterfone* "placed the burden of proof squarely upon the carriers—not the users or this Commission—to demonstrate" that terminal equipment "would cause either technical or economic harm to the telephone network." *Id.* at 54a. This "burden," the Commission said, "was to be met *prior* to the filing of a tariff restricting the use of such equipment." *Id.* (emphasis in original).

Finding that in the "seven years" since *Carterfone*, "the carriers have been afforded ample opportunity to propose effective procedures and/or tariff conditions to prevent harm without unduly restricting a customer's basic right to make reasonable use of the facilities and services furnished by the carrier," but that "this the carriers have failed to do," the FCC reached the "separate and independent conclusion" to adopt a set of technical standards applicable to terminal equipment, regardless of source. Res. App. 56a-57a.

4. In *Second Report and Order in Docket 19528*, 58 F.C.C. 2d 736 (1976) (Res. App. 79a), the FCC extended the standards program to PBX and key systems. In that Report, the FCC reiterated that *Hush-A-Phone* and *Carterfone* had established "an overall policy framework"; that it had allowed the interface device requirement to go into effect "[w]ithout ruling as to the necessity for or lawfulness of the tariff requirement"; and that the interface device requirement was "unnecessarily restrictive" and an "unjust and unreasonable discrimination." *Id.* at 80a-81a, 89a.[5]

On appeal from these decisions, the Fourth Circuit rejected AT&T's argument that the FCC lacked the power to include AT&T's own equipment in the standards program, stating that "what petitioners are attempting is the *preservation of the carriers' private lawmaking authority over independent manufacturers.*" *North Carolina Utilities Commission v. FCC*, 552 F.2d 1036, 1050-51 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977) (emphasis in original). The court also rejected AT&T's argument that *Carterfone* did not apply to terminal equipment, stating that the FCC "clearly held . . . that its *Carterfone* decision established an interconnection policy embracing other types of terminal equipment." *Id.* at 1042 n.3. This

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[5] In *Third Report and Order in Docket 19528*, 67 F.C.C.2d 1255, 1272 (1978) (A 6710, 6727) (footnotes omitted), the FCC again stated that the post-*Carterfone* tariffs were unlawful because they violated the legal principle established in *Hush-A-Phone* and applied in *Carterfone*:

> When we ruled in *Carterfone* on the lawfulness of blanket prohibitions on the use of . . . customer-provided equipment . . . we concluded that the essential vice of these tariff prohibitions was that they were indiscriminately applied both to harmful and to benign equipment . . . . Prohibiting the connection of benign equipment . . . could not legally be sustained. The carriers responded to this ruling by requiring protective devices . . . for all connections of customer-provided equipment . . . . As we found in our *First* and *Second Reports* herein, this response unnecessarily required the use of the protective devices for those connections which were benign.

Court denied the petition for certiorari filed by AT&T and others.

5. Even after the FCC's authority to adopt the standards program had been judicially upheld, AT&T continued to argue that the "complete service premise" required that it alone must provide at least one telephone instrument as "an integral part of basic service," and to do so would not violate "antitrust principles" because there was "only one complete service." *In re Primary Instrument Concept* (Res. App. 99a-100a). The FCC rejected AT&T's proposal, finding it "fundamentally inconsistent with the principles of *Hush-A-Phone*, *Carterfone*, *Mebane* and the Registration Program." *Id.* at 98a. The FCC reiterated that "since 1969 telephone subscribers have had the right to provide their own terminal equipment . . . ." *Id.* at 100a. Here, as in prior decisions, the Commission indicated that it was simply following the "broad principle laid down in *Hush-A-Phone* as to the 'telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental.' " *Id.* The Commission went on to state that one way in which "a customer can reasonably use telephone service is by supplying his own terminal equipment, *including telephones, PBXs and key systems*, provided only that he does not harm the telephone network or cause other public detriment." *Id.* at 102a (emphasis added).

Finally, in *Primary Instrument*, the FCC rejected AT&T's oft-advanced argument that it alone "must have complete end-to-end service responsibility," pointing out that this argument had been "expressly rejected . . . in *Carterfone* [in 1968] . . . and again in the *Second Report* in [1976] . . . ." *Id.* at 104a (citations omitted). As the FCC further stressed, the 1934 Communications Act does not "contain any requirement that the carrier furnish a terminal of any kind as part of any communications service." *Id.* at 103a.

C. THE TRIAL BELOW AND THE JURY VERDICT

1. The trial below centered on AT&T's interface device practice: Was it necessary to protect the network from harm caused by competitors' equipment, as AT&T claimed, or was it adopted by AT&T as a means of driving its competitors from the market and protecting revenues derived from its illegal monopolization of the telephone terminal equipment market, as the jury found. The trial lasted more than five months and is reflected in over 18,000 pages of trial transcript. A well-qualified jury heard live testimony by 60 witnesses and deposition testimony of 54 others. Nine hundred and forty-five exhibits were received in evidence. Litton proved its case in large measure through the live testimony of 17 top AT&T executives and senior AT&T engineers responsible for the interface device, including its present and former chairman, president, general counsel, executives in charge of marketing and engineering, the head of Bell Labs Quality Assurance, and through hundreds of documents obtained from AT&T's files.

2. Litton introduced evidence, consisting primarily of documents obtained from AT&T's files, which established that AT&T imposed the interface device not to protect the network but for the specific purpose of maintaining its illegal monopoly in the profitable telephone terminal equipment market by erecting a barrier to competition that would provide it time to update its obsolete products, reorganize its marketing organization, and revamp its outmoded cost accounting system. *E.g.*, A 11033, 7788, 9497, 2145, 2800-01, 4235, 4418-20, 4616-21, 10431, 16202-04, 1924, 2046-48, 2110, 7456, 7479, 16280-81. Pet. App. 28a. As early as February 1968, AT&T senior executives were told by its experts that requiring an interface device for competitive equipment "would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment." A 11995. AT&T estimated that the alternative to the interface device—standards and competition—could cost AT&T hundreds of

millions of dollars in profits. A 11976-78. As one AT&T document stated: "Only the 'Black-Box' [interface device] . . . stands as the last hardware barrier between us and the final challenge of unbridled, unlimited, no-holds-barred competition." A 7438.

The evidence before the jury showed that AT&T's interface device proved to be a devastating economic barrier to competition. AT&T required each customer using a competitor's equipment to pay it about $6 per month, or $72 a year, to rent an interface device for each AT&T telephone line. AT&T also imposed installation charges of about $20 per interface device. A 8103, 1789-1803, 1811-12, 16413-15, 2510-11. The evidence showed that these direct costs completely barred competitors from the residential single-line telephone set market, precluded competition from 93% of the key telephone systems market (5 lines or less), added 18 to 35% to the monthly cost of non-Bell key systems of 5 to 40 lines, and added 8 to 20% to the monthly cost of non-Bell PBX systems (40 to 2000 or more lines). A 1916-17, 6873, 7985, 9859, 9863, 16288-90, 2512-13, 2735-38, 3079-112, 7081, 11786-89, 2647-51, 2676-77, 3069-77, 3114-19, 3358-59, 12342, 11121, 16198-201. In addition to these direct costs, competitors had substantial related overhead costs of 8 to 10% for late deliveries, late cutovers and installation of defective interface devices. A 2400-04, 2418-19, 2502-06, 2554-55, 2647-51, 2682-83, 2895-99, 3931-37, 5149, 5252-56, 5265-69, 5866-69, 5872-73, 5878-80, 5912-13, 5986-87, 2832-33, 2837-42, 2844-53, 3118-19, 5941-42.

AT&T's interface device also created a substantial psychological marketing barrier to competition because it raised customer doubts as to the quality of the competitor's equipment. A 2647-51, 2832-33, 2837-38, 5143-46, 12169-74, 12177-81. AT&T was well aware of this effect. One AT&T executive, for example, admitted that such a requirement, if applied to AT&T equipment, would have suggested to telephone customers that "our equipment isn't properly engineered to begin with." A 9408, 2743.

3. Although AT&T spared no expense in its defense, it was unable to justify its exclusionary interface device as necessary to protect the network from harm.[6] Indeed, AT&T was unable to come up with a single instance in which a competitor's equipment had harmed the network. The trial record even showed that AT&T often purchased the identical equipment sold by competitors and leased it to its telephone customers without interface devices. AT&T was in the end unable to demonstrate that competitors' equipment posed any greater risk of harm to the network than its own equipment. A 1806-09, 1852, 2028, 2113, 2206, 2492-94, 2586-87, 8048.

Further, the evidence conclusively showed that whatever protection was needed could easily have been provided by a nondiscriminatory system of technical standards, suggested by the FCC as early as 1968. AT&T had in its possession at the time of *Carterfone* "technical standards" which readily could have been reduced to writing and published in 1968. Even under the most exaggerated testimony offered by AT&T at trial, standards could have been published by mid-1969—two years before Litton entered the market. A 1860-63, 1899-1904, 2146-47, 2302-03, 16337-38, 3983-85, 4104-05, 4155-56, 4249-50, 4265-76, 4293-94, 4326-28, 4432-47, 4466-67. Knowing that the interface device could not be justified and that standards were inevitable, AT&T nevertheless continued for nearly a decade to require the interface device while continuing to oppose all efforts to replace it with technical standards. It did so by pursuing a course of conduct that included repetitive, baseless claims, misrepresentations, deceit and delay before the FCC. *See infra* pp. 22-25.

4. After eight days of deliberation, the jury found (1) that AT&T had monopoly power in the terminal equipment market in the areas of the country where it operated (Res. App. 21a); (2) that AT&T had "wilfully"

[6] AT&T, in reports required by the FCC, disclosed that through 1981 it had spent $63 million defending this case during four and one-half years of pretrial and five months of trial.

maintained its monopoly "by predatory or anti-competitive conduct" (*id.*); and (3) that AT&T's monopolization had injured Litton. *Id.* In support of its finding that AT&T had wilfully maintained its monopoly power, the jury further found that AT&T had engaged in predatory or anticompetitive conduct by its bad faith (1) filing of the interface device tariff; (2) opposition to certification standards; (3) intentional delay in providing and installing interface devices; (4) refusal to sell inside wiring at all or on a reasonable basis; and (5) delay in making cutovers. *Id.* at 22a-23a. These five subfindings also supported the jury's finding that AT&T had attempted to monopolize the terminal equipment market. The jury further found that AT&T's violations of the Sherman Act drove Litton from the market and caused it $91,990,000 in damages as a competitor and $268,243 in damages as a user of the interface device.[7] *Id.* at 22a. These amounts were trebled as required by law. 15 U.S.C. § 15 (1976). AT&T's motion for judgment N.O.V., after full briefing and consideration, was denied by the trial court.

D. THE DECISION OF THE COURT OF APPEALS

In a comprehensive 90-page opinion reflecting a meticulous review of the Record on Appeal, which included a 35-volume Joint Appendix consisting of 16,489 pages, the Second Circuit unanimously affirmed the jury verdict that AT&T had monopolized and attempted to monopolize the relevant market, each sub-finding of anticompetitive conduct, and the damage award. It found the evidence "sufficient, both in terms of its weight and from the standpoint of causation," and commended the trial court for its handling of this "complex" and "difficult" case as "a model of judicial technique." Pet. App. 6a-7a, 58a.

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[7] The trial court, before discharging the jurors, praised them for being "extremely attentive" throughout the trial and for their "thoughtfulness and conscientiousness" in reaching their verdict, concluding that they had been "a vindication of the jury system and all that it means." A 6401.

1. Raising a "score of issues" on appeal (Pet. App. 6a),[8] AT&T attacked not only the sufficiency of the evidence, but also various evidentiary rulings of the trial court, Litton's damage study, the award of damages to Litton as a customer, and the legal and factual bases for the rejection of its *Noerr-Pennington* defense. Noting that "there is little in this case that the parties agree upon," the court reviewed the evidence with respect to each of the jury findings and found that it provided a reasonable and adequate basis for the jury's conclusions. *Id.* at 33a, 58a, 63a. After considering each of AT&T's objections, the court held the trial court's instructions and evidentiary rulings were "free from prejudicial error." It also found no merit in AT&T's attack on the verdict for Litton as a customer. *Id.* at 6a-7a. As for the damage study, the court found that it was "supported by the record and not based on assumptions as to evidence not in the record." *Id.* at 83a. It further noted that the award of $91,990,000 was "modest in light of the fact that Litton's lost profits were limited to years prior to 1978" (*id.* at 85a), and pointed out that Litton sustained out-of-pocket losses alone of $53 million. *Id.* at 77a.

2. The Court of Appeals rejected AT&T's *Noerr-Pennington* doctrine argument on two independent grounds. Pet. App. 38a-42a. First, the court held that as a matter of law the *Noerr-Pennington* doctrine did not apply to AT&T's private decisions to impose and to maintain its interface device requirement, because merely disclosing that requirement in a tariff filing was not a "request" for governmental action or an "expression" of political opinion protected by the First Amendment. *Id.* at 44a-

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[8] On the appeal, as here, AT&T did not dispute that it had monopoly power in the relevant market. It also made no claim that its monopoly was achieved or maintained through competitive superiority.

45a.[9] Second, the court unanimously held that even if the *Noerr-Pennington* doctrine applied, AT&T's conduct fell within the "sham exception" to that doctrine because AT&T made repeated baseless claims of harm to the network, misrepresented facts to the FCC, withheld critical information requested by the FCC, and impeded the work of the Commission's PBX Advisory Committee. *Id.* at 50a-53a. These efforts, the court concluded, constituted an "abuse of the administrative process that [fell] within the *Noerr-Pennington* sham exception." *Id.* at 54a. Accordingly, on this factual review, it sustained the jury's determination. *Id.*

3. In a lengthy petition for rehearing with suggestion for rehearing in banc, AT&T restated its factual arguments and claimed that the court misread the FCC decisions and that AT&T's conduct in opposition to the replacement of its interface device with standards was immune from antitrust liability under the *Noerr-Pennington* doctrine. The rehearing petition was unanimously denied, and not a single Second Circuit judge in regular active service requested that a vote be taken on the suggestion for rehearing in banc. Pet. App. 134a.

REASONS FOR DENYING THE WRIT

None of the considerations governing review on certiorari, as set forth in this Court's rules, supports the grant of the requested writ. The jury verdict and the Second Circuit's opinion are wholly consistent with settled law under the Sherman Act and the First Amendment. The decision below is not in conflict with any pertinent decisions of this Court or other Courts of Appeals. Nor is any issue of general or national importance presented by the petition.

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[9] One member of the panel did not concur on the first ground but did agree with the court on the second ground that AT&T's conduct clearly fell within the "sham exception" to the *Noerr-Pennington* doctrine. Pet. App. 42a. *See infra* pp. 21-22.

I. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH *NOERR-PENNINGTON* PRINCIPLES OR PRECEDENTS

Having adopted exclusionary practices specifically designed to establish and maintain its equipment monopoly and having had its asserted justifications for them over the course of several decades finally exposed as baseless in a five-month trial, AT&T here seeks to characterize this case, quite incredibly, as a First Amendment case. In its petition, AT&T raises as its main issue the claim that it has suffered an antitrust judgment because it "exercised its constitutional right to express its opinion . . . by making a public speech and by filing pleadings" with the FCC. Pet. 2-3.

This is not a First Amendment case. Litton was not driven out of business by something AT&T said or by something the FCC did as a result of AT&T's advocacy. The judgment against AT&T is based on what AT&T did on its own in adopting, imposing and enforcing its interface device requirement for competitors' equipment. In erecting and maintaining this artificial barrier to competition, AT&T relied not on any FCC rulemaking or adjudicative authority, but on its own monopoly power over the telephone network, which it unlawfully extended to the terminal equipment market.

AT&T's *Noerr-Pennington* argument was thoroughly considered and rejected by the court below. Pet. App. 38a-58a. The Second Circuit agreed with Litton that there were two independent, alternative grounds for its rejection: (1) "*Noerr-Pennington* is inapplicable because AT&T injured Litton not by requesting or as a result of governmental action, but by virtue of what AT&T itself did in filing and maintaining the interface tariffs while opposing the only feasible alternative—certification standards—in bad faith," or in the alternative (2) "this case presents a 'paradigm of the "sham" exception to the *Noerr* doctrine.' " *Id.* at 42a.

A. The *Noerr-Pennington* Doctrine Does Not Apply to This Case

Contrary to AT&T's principal argument (Pet. i, 2, 20, 23-24), Litton was not injured by AT&T's "legitimate advocacy" or expressions of "political opinion" but by AT&T's private business decisions to file and maintain the interface device requirement and oppose standards in bad faith, for the express purpose—and with the direct effect—of preventing competition and maintaining its monopoly over the terminal equipment market. As the Second Circuit said: "The decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC." Pet. App. 44a. Since "AT&T's power to exclude" competitors from the market "resulted not from the FCC's regulatory authority but from AT&T's exclusive control over the telephone network," the Second Circuit properly ruled that "AT&T cannot cloak its actions in *Noerr-Pennington* immunity simply because it is required, as a regulated monopoly, to disclose publicly its rates and operating procedures." *Id.*

The filing of the interface tariff was an exercise of AT&T's independent business judgment and initiative; it was not required or instituted by the FCC.[10] The same

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[10] The Second Circuit observed that this same conclusion had been reached by the other courts which had considered the question. Pet. App. 44a-45a. *See, e.g., Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716, 735 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 785 (1983) ("To the extent the carrier's conduct [in imposing the interface device] violates the FCA, those actions were neither compelled by the FCC nor adopted as agency policy, . . . it is the product of the regulated entity's independent initiative and judgment." (footnote omitted)); and *Sound, Inc. v. AT&T Co.*, 631 F.2d 1324, 1330 (8th Cir. 1980) ("Bell, not the FCC, proposes its rates, regulations and restrictions, subject, of course, to FCC approval. In filing each tariff, Bell implements its own business judgment in regard to its relationship with competitors.").

For similar statements by other courts, see *Northeastern Telephone Co. v. AT&T Co.*, 651 F.2d 76, 83-84 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Essential Communications Systems, Inc. v. AT&T Co.*, 610 F.2d 1114, 1124 (3d Cir. 1979); *United States*

is true of its maintenance of the exclusionary interface tariff for 10 years. AT&T could have revoked it at any time simply by filing another tariff. Pet. App. 45a n.32; *United States v. AT&T* Co., 524 F. Supp. at 1350 n.47.

AT&T's bad faith opposition to certification standards was just another means used by AT&T to perpetuate the interface device barrier to competition. AT&T's private action in filing and maintaining the interface device requirement, the Second Circuit said, "was the very embodiment of opposition" to equipment standards, the "only feasible alternative." Pet. App. 47a. AT&T's "opposition" was thus much more than merely "espousing a position before an administrative body." *Id.* It was, as the court added, "simply the other side of the interface tariff coin" (*id.*), since the "effect" of the opposition "was to maintain the interface tariffs and whatever anticompetitive or exclusionary effect that flowed therefrom." *Id.* at 48a.

In holding the *Noerr-Pennington* doctrine inapplicable, the Second Circuit pointed out that this case was similar to *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), "because AT&T was 'engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws.'" Pet. App. 44a. Further, as this Court stated in *Continental Ore*, in language equally applicable here, imposing Sherman Act liability "for eliminating a competitor from the . . . market by exercise of the discretionary power" retained by defendants under regulation "would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr*." 370 U.S. at 707-08.

The Second Circuit also followed *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 601-02 (1976), where a plurality of this Court rejected the same *Noerr-Pennington*

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v. AT&T Co., 524 F. Supp. 1336, 1350 n.47 (D.D.C. 1981); *Litton Systems, Inc. v. AT&T Co.*, 487 F. Supp. 942, 956-57 (S.D.N.Y. 1980).

argument that the filing of a tariff was a protected "request" for governmental action. There *Noerr* was held to be inapplicable to private action taken in compliance with state law, even where that action was approved by the regulatory authority. This Court stated:

> [N]othing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal included in a tariff, and thereby require that the proposal be implemented until a revised tariff is filed and approved, is a sufficient reason for conferring antitrust immunity on the proposed conduct.

428 U.S. at 601-02.

Here, of course, the interface tariff was never even approved by the FCC and, when the FCC ruled on its validity, it was found to be "unlawfully" restrictive and discriminatory, unjust and unreasonable. Res. App. 81a, 89a. As the court below stated: "The fact that the FCC might ultimately set aside a tariff filing does not transform AT&T's independent decisions as to how it will conduct its business into a 'request' for governmental action or an 'expression' of political opinion." Pet. App. 44a-45a.

The Second Circuit's reliance on *Cantor* is consistent with the Eighth Circuit's decision in *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 814 (1983). Pet. App. 45a-46a. There, the Eighth Circuit held that filing tariffs disclosing electric rates did not confer *Noerr-Pennington* immunity for the decisions to set those rates because it was not the "expression of opinion" that allegedly injured the plaintiff but defendant's "conduct in the market place." 671 F.2d at 1181.[11] On petition for certiorari

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[11] *Accord, Mid-Texas Communications Systems, Inc. v. AT&T Co.*, 615 F.2d 1372, 1382-83 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980) (refusal to interconnect with another telephone company not within the *Noerr-Pennington* doctrine as action "in an essentially

in *City of Kirkwood*, the Solicitor General, in a brief filed at the invitation of this Court, expressed the views of the United States that "reliance on *Cantor* was appropriate"; that *Noerr-Pennington* was thus "inapplicable" as a matter of law to defendant's "private conduct" in establishing the rates; and that the petition should be denied. Brief for the United States as Amicus Curiae, Res. App. 10a, 11a, 12a n.11, 18a. That petition was denied this term.

In every case cited by AT&T where the application of the *Noerr-Pennington* doctrine has been upheld, the defendant endeavored to injure his competitor, not through private action, but through governmental action or decision.[12] Thus, there is no conflict between the decision

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private context"); *United States v. Title Insurance Rating Bureau of Arizona*, 517 F. Supp. 1053, 1059-60 (D. Ariz. 1981), *aff'd*, 700 F.2d 1247 (9th Cir. 1983).

[12] In five of the six cases cited by AT&T (Pet. 21 n.13, 22 n.15), the plaintiffs' injury flowed from governmental action (or inaction) taken as a result of defendants' efforts to influence the decision making body, not as a result, as here, of defendants' private anticompetitive conduct. *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 262, 267-68, 272 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (claimed injury caused by "governmental action" including promulgation and enforcement of regulations by state agencies inhibiting mail order pharmacies and enforcement of state law by state board through injunction proceeding and withholding and revocation of license); *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 295-97 (8th Cir. 1978) (claimed injury caused by city government's refusal to reopen airport); *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1078, 1081 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (claimed injury caused by city agency's refusal to issue building permits); *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 229, 232 (7th Cir. 1975) (claimed injury caused by city council's refusal to award cable television franchise); *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1363, 1365 (10th Cir. 1972) (claimed injury caused by injunction obtained by state motor vehicle commission enjoining violations of state law). In the sixth case, *Mid-Texas*, *see supra* note 13, the court held that AT&T's independent refusal to

of the Second Circuit here and any decisions of this Court or the other circuits. The court below understood the principles of *Noerr* and *Pennington* and applied them in the same manner as did this Court in *Continental Ore* and *Cantor*.

B. The Trial Evidence Fully Established that AT&T's Conduct Fell Within the Sham Exception

The Second Circuit did not rest its rejection of AT&T's *Noerr-Pennington* defense only on its inapplicability as a matter of law; it decided unanimously that even if *Noerr-Pennington* applied, the trial evidence in this case overwhelmingly showed that AT&T's conduct came within the "sham exception." Noting that the sham exception was presaged by this Court in *Noerr*, the Second Circuit turned to *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972), where this Court spelled out the parameters of the sham exception. Where "the administrative and judicial processes [are] abused" in an effort to injure competition, this Court said, *Noerr-Pennington* immunity is denied. *Id.* at 513; Pet. App. 48a-49a. This Court identified "many" forms of "abuse" involving "the administrative or judicial processes" that could not "acquire immunity by seeking refuge under the umbrella of 'political expression.'" 404 U.S. at 513. Two forms of such abuse specifically mentioned were "baseless, repetitive claims" and "misrepresentations." 404 U.S. at 513. *See Landmarks Holding Corp. v. Bermant*, 664 F.2d 891, 894, 896 (2d Cir. 1981). Another form of abuse is the suppression and concealment of information from an agency. *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 274, 278-79 (D.C. Cir. 1972). Each form of abuse may show that the "antitrust defendant had not truly sought to influence a governmental decision" but that it used the process to

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interconnect was not within the *Noerr-Pennington* doctrine. The court, however, found that AT&T's defense of a complaint filed with the FCC was protected by *Noerr-Pennington* because there was no evidence of sham conduct. 615 F.2d at 1383-84.

delay and impede his competitors in the market. P. Areeda, *Antitrust Law* ¶ 203.1a (Supp. 1982).[13]

Applying these principles to the facts of this case, the court below decided, after a thorough and independent review of the trial record, that the evidence amply supported the jury's determination that AT&T's conduct "amounted to the sort of abuse of the administrative process that falls within the *Noerr-Pennington* sham exception." Pet. App. 54a, 58a. In its opinion the court highlighted some—but by no means all—of the evidence supporting the jury's conclusion. The court specifically pointed to trial evidence showing "that AT&T's ongoing claim of harm to the system was baseless"; that AT&T, in its representations, "affirmatively misled the FCC"; and "that AT&T did what it could to delay and obfuscate the efforts undertaken by the FCC and other interested parties to develop certification standards." *Id.* at 51a-53a. *See also id.* at 48a.[14] Finding this evidence compel-

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[13] Other antitrust commentators recognize the dangers of abuse of administrative processes through misrepresentation and baseless claims interposed to deter competitors. *E.g.*, R. Bork, *The Antitrust Paradox* 353-55, 359-60 (1978); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80, 122 (1977).

[14] The sham evidence constituted only a small part of the total body of evidence proving AT&T's bad faith opposition to certification. Instead of being limited to what AT&T did before the FCC in 1973, as AT&T claims (Pet. at 9-10), the basic trial evidence of bad faith opposition to standards covered a ten-year period going back to the *Carterfone* period. In 1967, AT&T's management created a special task force to develop "the strongest possible case to resist . . . customer ownership" of terminal equipment. A 4070-84, 4088-92, 11698, 11972. That task force reported to management that an interface device requirement "would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment" and, therefore, that the "entire concept of customer-owned equipment must be based on tariff type-approval" [*i.e.*, *standards*]. A 11995. However, AT&T's top management refused to issue standards and embarked on a program to require the interface device and delay any standards program even though,

ling, the court stated: "As a textbook example of a monopolist in control of an essential facility, *see United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), it is difficult to conclude that these efforts could not have amounted to an abuse of the administrative process." *Id.* at 53a.

AT&T does not claim here that the Second Circuit misapprehended the proper legal standard for the sham exception. Instead, in its petition it makes a disjointed attack in text and footnotes on the court's evaluation of the trial evidence, in effect remaking its closing jury argument as to the meaning, weight and significance that should be attached to selected items of the sham evidence. Pet. 17, 24, 25, 26 and n.17. In doing so, AT&T not only ignores but violates the standard of review for an appellate court—that the trial evidence must be viewed in the light most favorable to the prevailing party, giving it "the benefit of all inferences which the evidence fairly supports," regardless of whether contrary inferences might be drawn. *Continental Ore*, 370 U.S. at 696; Pet. App. 50a-51a.

Without attempting to address all of AT&T's mischaracterizations of the evidence, two egregious examples need answering. First, AT&T claims that the Second Circuit relied "primarily" on a public speech by AT&T Chairman deButts as evidence of AT&T's sham conduct. Pet. 10-11, 23-24, 26. This is simply incorrect. Litton never claimed and the Second Circuit did not find that

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throughout the succeeding years, AT&T's top management was told repeatedly that standards were inevitable (A 10435, 11001, 7337-38, 16192, 1991-96, 2282-85, 7373, 7310, 8110-11), that AT&T had no proof of harm to the network (A 10348-49, 8006, 8037, 8061, 8048), that AT&T had been unable to respond to the FCC's requests for harm data (A 10353-54), and that a certification program would be "as effective in protecting the network—and perhaps more effective" than its interface device. A 7492, 1928-30, 1933-34, 2003-04. The trial evidence was summarized in the opinion below and reviewed in much greater detail in Litton's main brief to the Second Circuit. Pet. App. 4a-33a.

the deButts speech itself constituted sham activity. *See* Pet. App. 52a. In fact, the speech did not involve advocacy before the FCC or any state agency but was made at the national convention of a trade association of regulators in Seattle.

The speech was evidence of AT&T's intent to maintain its monopoly. In this speech deButts revealed publicly AT&T's previously adopted policy to fight competition to the bitter end. A 1868-71, 1877-78, 1982-83.[15]

Further, the circumstances surrounding the preparation of the speech were relevant in showing that AT&T did make deliberate misrepresentations to the FCC in a subsequent filing. When a draft of the speech was prepared, it stated that "current studies" supported AT&T's claim of harm. AT&T's top technical expert (Goldstein), who reviewed the draft, warned that those studies did not "prove anything" and that they should not be used in the speech. A 2263-73. Even the author of the studies (Hunt) admitted at trial that they "did not furnish any evidence" that competitive equipment was more harmful than AT&T equipment. Tr. 2002.

Despite this knowledge, the speech was not changed and deButts delivered it with the misrepresentations about harm.[16] Four weeks later, in its formal submission to the FCC opposing standards in any form, AT&T, relying on the same Hunt studies, made the same misrepresentations, only in stronger terms, stating that these studies showed that customer-provided equipment caused "real" and "actual" harm to the network. A 13170, 13206.

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[15] This corporate policy was adopted by deButts with full awareness of its antitrust consequences. Right after delivering the September 1973 speech, deButts admitted in private meetings within the Bell System that his Seattle speech had "contributed more to employment opportunity in the legal profession than did Messrs. Sherman, Clayton, Wright and Patman combined." A 7939; *see also* A 7934.

[16] Prior to delivering this 1973 speech, deButts and other top AT&T officials had been repeatedly told that there was no proof of harm to the network. A 8037, 8061, 10348-49, 10353-54.

Second, AT&T in its petition claims that the Second Circuit opinion is based upon the "single erroneous premise" that the *Carterfone* decision [redacted] permitted customers to provide their own terminal equipment. AT&T bases this argument on a few phrases taken out of context from two post-*Carterfone* FCC decisions while it ignores the basic ruling of those decisions confirming the broad principle of *Carterfone* and *Hush-A-Phone* that AT&T could not bar customers from using harmless equipment. Pet. 3, 6, 7, 13, 17, 30.

This claim was the basis of AT&T's argument before the jury that it acted in good faith when it rejected standards and filed its interface device tariff in 1968. The jury had before it all of the pertinent FCC decisions and the evidence from AT&T's top executives and contemporaneous documents showing that AT&T acted with full knowledge that standards were the best way to protect the network, that the interface device would be a "redundant, artificial and economic barrier" to competition, A 11995, and despite the warning of its own regulatory experts that it was "not at all responsive" to *Carterfone*. A 7206. *See supra* note 14. The jury rejected AT&T's argument and in answers to special interrogatories found that AT&T acted in bad faith. Both the trial court and the Second Circuit affirmed this determination. Pet. App. 13a, 22a n.12, 48a-54a.

This argument by AT&T has fared no better in other courts. Six years ago AT&T made this same argument to the Fourth Circuit in *North Carolina Utilities Commission v. FCC* where it was rejected and AT&T repeated it in its unsuccessful petition for certiorari to this Court. *See* discussion *supra* pp. 8-9. More recently, the Ninth Circuit rejected it in *Phonetele, Inc. v. AT&T Co.*, *see supra* note 10, where the court affirmed, after extensive discussion, its earlier 1975 holding "that while the precise holding of *Carterfone* did not decide the issue of customer replacement of NCSU equipment, the broad

and binding principle of *Carterfone*, and *Hush-A-Phone* before it, applied to *all* telephone equipment." 664 F.2d at 730-31 (emphasis in original); *see also id.* at 724 and n.20. AT&T repeated this argument in its petition for certiorari in *Phonetele*, which was denied this term.

The Second Circuit here recognized (Pet. App. 10a), as had the Ninth Circuit, that the 1956 Court of Appeals' decision in *Hush-A-Phone* was controlling and that it laid down the broad principle of law that only harmful equipment could be barred from interconnection with the telephone network. In subsequent decisions, including both *Carterfone* decisions, the *First*, *Second* and *Third Reports* in Docket 19528, and the *Primary Instrument* opinion, the FCC applied this legal principle, as it was required to do. *See discussion supra* pp. 4-10. Significantly, AT&T's petition does not mention the Court of Appeals' decision in *Hush-A-Phone*—not even once.

Moreover, the Second Circuit's decision is not based upon a "single premise" or upon the *Carterfone* reconsideration decision alone but upon an examination and an assessment of the totality of the evidence that properly integrated the regulatory decisions with the evidence of AT&T's actual intent and conduct. *See* Pet. App. 50a-51a. Thus, AT&T's argument, besides being contrary to the decisions of the FCC and three federal courts of appeals, simply ignores the evidentiary context in which the jury and the Second Circuit reached their decisions.[17]

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[17] Other errors and misstatements in the petition include AT&T's claims (1) that the interface device tariff was never held "illegal", Pet. 4 (*Fact*: The FCC specifically held the tariff unlawful in *First Report*, Res. App. 56a; *Second Report*, *id.* at 89a; and *Third Report*, A 6710, 6727); (2) that economic issues delayed certification, Pet. 13 n.6, 27 (*Fact*: The economic issues were settled in 1968 *Carterfone* decision. *See Second Report* at 81a-82a and *First Report* at 58a-59a); (3) that the Second Circuit holding rests on the conclusion that *Noerr* doctrine "only applies to attempts to obtain affirmative governmental action" and not to petitioning to maintain an anti-competitive *status quo*, Pet. 20-21 (*Fact*: The Second Circuit did not make such a distinction, and Litton never urged it); and (4) that

Unable to demonstrate any conflict between the decision below and the decisions of this Court or any other circuit court on the sham exception or its application, AT&T is reduced to arguing that the Second Circuit's decision conflicts with a footnote in District Judge Greene's opinion denying AT&T's motion to dismiss at the close of the Government's case in *United States v. AT&T Co.*, 524 F. Supp. at 1363 n.110. Pet. 22-23. A comparison of the two decisions, however, discloses no conflict. The sham exception standards applied by Judge Greene are the same as those applied by the Second Circuit. *Compare* 524 F. Supp. at 1364 with Pet. App. 48a-54a. Judge Greene found that, where the evidence showed that "AT&T's sole purpose" in a proceeding was to "preserve its monopoly and that it well knew that the positions it took before the FCC were baseless," there was no *Noerr-Pennington* shelter. 524 F. Supp. at 1364. This is exactly what Litton proved.[18]

Judge Greene's decision, moreover, is fully consistent with the jury's finding, and the decision below upholding that finding, that AT&T wilfully maintained its terminal equipment monopoly through the filing and maintenance

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the sham exception does not apply where a party "respond[s]" to rather than "initiate[s]" the agency proceeding, Pet. 23 (*Fact*: Initiating as well as responding to administrative proceedings may entail abuse of that process. *See, e.g., Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755, 757, 762 (9th Cir. 1970), *aff'd*, 404 U.S. 508 (1972)).

[18] AT&T incorrectly states that Judge Greene had before him in the Government case the "same" or "identical" evidence of AT&T's sham activities involving the FCC that was presented to the jury in the *Litton* case. Pet. i and 23. The important testimony of such key witnesses in *Litton* as Birck (Tr. 9539-9769), Hohmann (Tr. 9003-9537, 10202-10380), Irwin (Tr. 5954-6133, 16637-16691, 16768-16865), Neuschel (Tr. 2909-3130), Goldstein (Tr. 3351-3614, 8138-8996), Brown (Tr. 7958-8036, 8113-8129), and Bonsack (Tr. 3883-3926) and many of the numerous exhibits on which they were examined were not offered by the Government in its case. Thus, Judge Greene did not have before him the specific evidence on which the *Litton* jury relied.

of the interface device tariff rather than the issuance of standards. He held that "AT&T's failure to propose a certification [*i.e.*, standards] program for customer-provided equipment" could not "conceivably be construed as petitioning for governmental action." *Id.* at 1363 n.110.

Consistent with the Second Circuit (Pet. App. 44a), Judge Greene recognized that the interface "tariffs were [AT&T's] own creation, and they could have cancelled them at any time." *Id.* at 1350 n.47. He concluded that "on a factual basis, the government's terminal equipment interconnection case presently stands unimpeached." *Id.* at 1351. In fact, after having offered almost all of its defense case, AT&T consented to the divestiture of all of its operating companies comprising 75% of its assets with a value of $45 billion. *United States v. AT&T Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S. Ct. 1240 (1983).

II. THE PETITION RAISES NO ISSUE OF PUBLIC OR NATIONAL IMPORTANCE

AT&T's petition presents no new or novel issue under the First Amendment or the *Noerr-Pennington* doctrine. At most, this case involves a straightforward application of the sham exception to the facts of this case. None of the issues raised in the special factual context of this case are likely to arise again in view of the consent decree that has been entered in the Government case against AT&T. Under the terms of that decree AT&T is required to divest all of its local operating companies on January 1, 1984, and in consequence, AT&T will no longer be able to use its exclusive control over the local telephone network to exclude competition from the terminal equipment market. *See* Pet. App. 44a, 53a.[19]

[19] As for certain other antitrust cases currently pending against AT&T which are collected at page 28 n.20 of AT&T's petition, those cases will have to be resolved on the basis of their particular pleadings and factual records. Whether collateral estoppel should be

As for the three so-called "related issues" tagged on to the end of its petition, AT&T admits that these issues are not independently worthy of review but should be taken only if the main issue is reviewed. Pet. i and 27. In no event, we submit, do any of these issues raise concerns of national importance or otherwise warrant review.

First, AT&T contends that the *Noerr-Pennington* issue was improperly submitted to the jury under instructions that did not "state that advocacy is protected, regardless of anticompetitive purposes." Pet. i and 27. AT&T misstates the instructions. The *Noerr-Pennington* instruction given by the trial court did inform the jury that AT&T could "seek" governmental action which "would be harmful to competition." A 6275-78. Moreover, as the court below pointed out, AT&T's argument is predicated on singling out a part of one instruction that was not the *Noerr-Pennington* instruction, and is "answered by reviewing the jury instructions, as we must, in their totality." Pet. App. 54a-55a. After so reviewing the jury instructions, the court below concluded that the instructions "accurately . . . tracked the Supreme Court's explication of the sham exception" and were not erroneous. *Id.* at 57a.

Second, AT&T contends that its conduct "cannot be held to violate the antitrust law if it was a reasonable attempt to comply with the then existing state and federal regulatory requirements." Pet. 27. AT&T did not raise this issue on appeal below. In any event, the jury considered AT&T's actions and found them to be unreasonable under the antitrust laws, just as the FCC considered the same actions and found them unreasonable under the Communications Act. Finally, the jury rejected AT&T's defense of reasonableness under a proper instruction that it should consider "regulation" and the regulatory rul-

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applied in any of those cases is a matter left to the discretion of the trial judge under the standards established by this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

ings in evidence as factors in determining the "purpose and reasonableness of the defendants' acts and practices." A 6255.

Third, AT&T asserts that Litton was not entitled to sue for antitrust damages as a user of the interface device under the "filed tariff doctrine" of *Keogh v. Chicago & Northwestern Railway*, 260 U.S. 156 (1922). Pet. 28. But as the court below held, the *Keogh* doctrine does not apply where, as here, the regulatory agency "disapproved" the tariff, and the issue here was not the reasonableness of the rate but "whether there should have been any charge at all." Pet App. 73a-74a and the cases cited therein.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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